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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 118

JAMES A. DOMBROWSKI AND SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., PETITIONERS

v.

SENATOR JAMES EASTLAND, INDIVIDUALLY AND AS CHAIRMAN OF THE INTERNAL SECURITY SUBCOMMITTEE OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE; J. G. SOURWINE, INDIVIDUALLY AND AS COMMITTEE COUNSEL FOR THE INTERNAL SECURITY SUBCOMMITTEE OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (R. 100–109) is reported at 358 F. 2d 821. The opinion and orders of the district court (R. 12–15, 17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966. The petition for a writ of cer-

tiorari was filed on May 5, 1966, and granted on October 10, 1966 (385 U.S. 812). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the claim for damages based on respondents' alleged participation in a conspiracy, the district court erred in rendering summary judgment for respondents where the uncontroverted proof was that they had not participated in any conspiracy.

2. Whether the court of appeals erred in holding that, even if respondents had participated in the alleged conspiracy, they would be immune from suit for damages because the only acts purporting to connect them with the alleged conspiracy—the issuance of the subpoenas—were within their authority as legislative officers of the United States.

3. Whether the court below erred in dismissing petitioners' claim for injunctive relief on the ground that an injunction directed to respondents—the Chairman and Chief Counsel of a Subcommittee of the United States Senate—would be ineffective to control the disposition of documents in the possession of the Subcommittee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Art. I, § 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respec-

tive Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in per-

son or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT

By this suit petitioners seek money damages from and an injunction against James O. Eastland, a United States Senator, and J. G. Sourwine, Chief Counsel to a Senate Subcommittee of which Senator Eastland is Chairman. Petitioners' grievance concerns a seizure of their records by officials of the State of Louisiana. This case is founded on petitioners' allegation that Senator Eastland and Chief Counsel Sourwine issued subpoenas of the Subcommittee as a part of a conspiracy with the State officials. The undisputed facts and the prior proceedings are outlined below.

1. *The Facts.* The following facts are established by the uncontradicted affidavits and depositions of record.

Senator Eastland is Chairman of the Senate Committee on the Judiciary and of that Committee's Internal Security Subcommittee; J. G. Sourwine is the Chief Counsel to the Subcommittee. (R. 34–35, 37.) The Subcommittee—which is properly designated as the Subcommittee to Investigate the Admin-

istration of the Internal Security Act and other Internal Security Laws—was created to investigate, among other things, "the extent, nature, and effects of subversive activities in the United States * * *." S. Res. 366, 81st Cong., 2d Sess. (1950).

Petitioners—Southern Conference Educational Fund (SCEF) and Dombrowski, SCEF's Executive Director—have been under Subcommittee scrutiny since 1954. After an investigation of SCEF in that year, the Subcommittee reported (R. 38–39) that SCEF had been established as an adjunct of the Southern Conference for Human Welfare, a communist front organization, and had continued to function after the latter organization had been exposed and finally dissolved.[1]

[1] "The Southern Conference for Human Welfare was conceived, financed, and set up by the Communist Party in 1938 as a mass organization to promote communism throughout the Southern States. Earl Browder, former general secretary of the Communist Party in the United States, in a public hearing, identified the Southern Conference for Human Welfare as one of the Communist Party's 'transmission belts.' Under date of March 29, 1944, the Southern Conference for Human Welfare was cited by the Special Committee on Un-American Activities as a Communist front and, on June 12, 1947, by the Congressional Committee on Un-American Activities as a Communist-front organization 'which seeks to attract southern liberals on the basis of its seeming interest in the problems of the South,' although its 'professed interest in southern welfare is simply an expedient for larger aims serving the Soviet Union and its subservient Communist Party in the United States.'

"The Southern Conference Educational Fund, Inc., was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational

In 1960, the Legislature of the State of Louisiana established the Joint Legislative Committee on Un-American Activities. That Committee was directed to "study, investigate and analyze," among other things, "the activities of groups and organizations which have as their objectives * * * the overthrow of the [government of the] State of Louisiana, or of the United States by force, violence or other unlawful means [and] all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States * * *" (R. 68–69). The Louisiana Legislative Committee has, since its creation, "studied, investigated, and analyzed the facts relative to a number of known or suspected subversive organizations operating in the State of Louisiana," including, *inter alia,* SCEF, to which the Committee's attention was directed by the Senate Subcommittee's 1955 report (R. 70).

The Louisiana Committee had been authorized to "cooperate and meet with similar committees

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Fund, Inc., continued. The official paper, the Southern Patriot, which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.

* * * * *

"Dr. James A. Dombrowski was identified as executive director of the Southern Conference Educational Fund, Inc., who immediately prior to the assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline * * *" (R. 38–39).

* * * of the Federal Government" (R. 69). Pursuant to this authorization, on several occasions prior to July 1963, the Committee's counsel, Jack N. Rogers, requested and received from respondent Sourwine, Chief Counsel to the Senate Subcommittee, information relating to matters under investigation by the Louisiana Committee. In July of 1963, Rogers told Sourwine that the Louisiana Committee might subpoena SCEF's records, and promised to advise Sourwine if the Louisiana Committee should thus procure any material of interest to the Senate Subcommittee (R. 39–40, 71).[2]

In August or September of 1963, Rogers called Sourwine to ask whether, if the Louisiana Committee were to subpoena SCEF's records, Sourwine and Benjamin Mandel, Director of Research for the Senate Subcommittee, would help the Louisiana Committee in evaluating the material (R. 71). Sourwine discussed this request with Senator Eastland, who instructed him that he and Mandel might assist in such evaluation if—and only if—the records subpoenaed "should appear to be within the scope of the investigative authority of the Senate Committee * * *" (R. 40). The Senator "emphasized" (R. 40):

> that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to Communist or Communist-front activities, especially

[2] The Subcommittee had maintained a continuing interest in SCEF. After 1954 the Subcommittee "continu[ed] to maintain a file and to accumulate information which became available" about SCEF. (R. 44.)

Communist infiltration of mass organizations and the financing of Communist fronts.

Neither respondents nor anyone else associated with the Senate Subcommittee heard anything further from the Louisiana officials in regard to this matter until October 4, when Rogers telephoned Sourwine to inform him that the Louisiana Committee had obtained SCEF records which would "be of substantial interest to his sub-committee," and asked that he and Mandel go to Louisiana to help evaluate the material. Sourwine and Mandel acceded to Rogers' request (R. 40, 72–73). It was at this point that Sourwine learned that the Louisiana Committee had obtained the records not by subpoena but by search warrant (R. 47).[3] Prior to October 4, Sourwine had believed at all times that a subpoena would be used.

[3] The Louisiana Committee had concluded that SCEF was violating the Louisiana criminal statutes relating to subversive activities, and it therefore determined to secure the records by search warrants. Petitioners claim the record in the Louisiana litigation (discussed *infra*, p. 12) indicates that this decision was made in August 1963 (prior to Rogers' contact with Sourwine). See Pet. Br. at 136–139. We note, however, that the affidavit on which they rely (Pet. Br. App. F) was made over a year after the entry of the judgment herein. It is undisputed, moreover, that Rogers had told Sourwine that the records would be obtained by subpoena and at no time had mentioned to Sourwine the possibility of proceeding by means of warrants (R. 40, 71). In his affidavit, Rogers stated that "at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against the SCEF and its officers by way of arrest and search warrants rather than by way of subpoena" (R. 74). Sourwine's uncontradicted testimony was that he "did not know until after the material had been secured that it had not been secured through subpoena" (R. 47).

The circumstances under which the arrest and search war-

In Louisiana, Sourwine ascertained the nature and content of the material seized and concluded that it "did in fact include a substantial quantity of material which would be of interest to the Internal Security Subcommittee * * * in pursuance of its investigative functions and within the limits of the directive which had been given * * * by Senator Eastland" (R. 41). Sourwine communicated his conclusion to Senator Eastland by telephone, recommending that all of the material be subpoenaed from the Louisiana Committee by the Senate Subcommittee. Senator Eastland authorized issuance of the subpoenas (R. 35).

On that day, October 5,[4] Sourwine served upon the State officials subpoenas requiring production of the SCEF records in Washington on October 29.[5] On behalf of the Subcommittee, Sourwine took possession of the material then held by the Louisiana Committee,

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rants were obtained and executed are set out in *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 n. 4. After a preliminary examination of the material which had been seized, the Louisiana Committee subpoenaed the records from the Louisiana State Police.

[4] The subpoenas were dated October 4, rather than October 5. The uncontradicted testimony was that this mis-dating was a stenographic error (R. 33). The typist stated by affidavit that when she typed the subpoenas, on October 5, she copied the descriptions of the material to be subpoenaed from the subpoenas issued by the Louisiana Committee and inadvertently copied the date of October 4 from those subpoenas (R. 82). Her testimony was corroborated by Sourwine (R. 48, 49), Rogers (R. 73) and Willie (R. 80).

[5] The subpoenas served by Sourwine had been signed by Senator Eastland and were filled in pursuant to the Senator's instructions (R. 32). In accordance with the Subcommittee's customary procedure, the subpoenas were issued without prior consideration by the full Subcommittee (R. 34).

and designated the Superintendent of the Louisiana State Police as custodian for the Subcommittee (R. 34, 41, 73). The Louisiana Committee was allowed access to the records pending their removal to Washington (R. 62, 73). Thereafter, following a hearing, and on the basis of the evidence adduced, the Louisiana Committee found that SCEF "was a Communist front organization, and also a subversive organization, aiding and abetting the Communist conspiracy" (R. 73).

On October 25, petitioners secured a Louisiana State court ruling that the warrants of arrest had been issued without probable cause (R. 28). On October 27, petitioners commenced an action in the United States District Court for the Eastern District of Louisiana, against the State officials and Senator Eastland, seeking damages and an injunction restraining the removal of the SCEF records from the State. Senator Eastland was never served in that action. District Judge Ainsworth advised petitioners to notify the defendants that the request for an injunction would be heard on Monday, October 28 (R. 29).

When Senator Eastland received a telegram from petitioners' counsel informing him of these proceedings,[6] he instructed Sourwine to have the records under subpoena immediately transferred from Louisiana to Washington (R. 53–55).[7] By October

[6] The telegram apparently read: "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 a.m., October 28, to discuss an injunction enjoining turning over SCEF and Smith and Walter records to Senator Eastland." (R. 54.)

[7] When his deposition was taken, Sourwine was asked if there

28 the records were on their way to Washington. Pursuant to Subcommittee resolution of November 14, all of the records obtained were photostated for the Subcommittee's use and the originals were returned to the Louisiana Committee (R. 36–37).[8]

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were any connection between the "request for injunction" and the removal of the documents (R. 57–58):

"A. I did not know about a request for an injunction, sir, but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.

"Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind.

* * * * *

"Q. Is it correct that the purpose of the removal of the documents was to put them beyond the jurisdiction of the Federal Judge in New Orleans?

"A. This is correct. The Federal Judge would have had no jurisdiction under any circumstances. They were in the possession of the United States and no Federal court would have had any jurisdiction over them all."

[8] The Subcommittee resolution of November 14 reads (R. 36–37):

"Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

"Present: Senators Eastland, Dodd, Hruska, Dirksen and Scott.

"After discussion, and on motion of Senator Dirksen, it was Ordered that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnston, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively

We have been advised that the Louisiana Committee has returned all of the original records to petitioners.

2. *Other Proceedings.* On January 29, 1964, petitioners were indicted for violation of the Louisiana anti-subversive statutes; they then moved for, and secured, a State court determination that the records seized from SCEF could not be introduced as evidence because the search warrants, like the arrest warrants, had been issued without probable cause. Pet. Br. App. 118–119.

Petitioners also sought declaratory and injunctive relief to restrain various Louisiana officials from prosecuting or threatening to prosecute them under the Louisiana anti-subversive statutes. In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court held several Louisi-

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with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the possession of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

"JAMES O. EASTLAND, *Chairman.*

"I consent and agree to the foregoing procedure.

"JOHN L. MCCLELLAN.
"OLIN D. JOHNSTON.
"ROMAN L. HRUSKA."

ana statutory provisions unconstitutional and directed the district court to frame an order (380 U.S. at 497–498):

> restraining prosecution of the pending indictments against the individual appellants, ordering immediate return of all papers and documents seized, and prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control Law here found void on their face. * * *

Meanwhile, petitioners' action for damages proceeded in the federal courts in Louisiana. Since Senator Eastland was never served, the defendants in that action were the State officials allegedly involved in the search—Thomas D. Burbank, Russell R. Willie and James H. Pfister. The district court denied the motions for dismissal and summary judgment filed by Pfister, Chairman of the Joint Legislative Committee. Acknowledging that, under *Tenney* v. *Brandhove*, 341 U.S. 367, Pfister was entitled to absolute immunity for "legitimate legislative activity," the district court was unable to accept Pfister's contention that the acts complained of were "fairly within the province of the Committee's inquiry" because Pfister's affidavits to that effect were controverted and his credibility attacked by defendant. Pet. Br. App. 121–129. Accordingly, the district court concluded, in regard to Pfister, that there were genuine and material issues of fact.

On the other hand, the district court granted Police Superintendent Burbank's motion for dismissal because his uncontroverted affidavit showed that "he took no part personally in any of the activities in connection with the execution of the warrants," not-

withstanding plaintiff's assertion that it was "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank" (R. 98–100).[9]

The district court also dismissed a third-party complaint by which Pfister sought to implead the other members of the Louisiana Committee. That determination, however, was reversed by the Fifth Circuit, which found that affidavits before the court cast doubt on "the accuracy of the committee members' affidavits that they did not authorize the raids and in fact knew nothing of them before they were carried out." Pet. Br. App. 134.

3. *Proceedings Below.* In this, a companion suit to the Louisiana litigation, petitioners sued Senator Eastland and Chief Counsel Sourwine[10] for a half million dollars in damages and for an injunction restraining respondents and "all persons acting in concert with them" from using the SCEF documents and ordering respondents to return the documents and any copies of them to petitioners (R. 10–11). The complaint alleged that respondents Eastland and Sourwine, with the Louisiana officials (R. 4):

> * * * entered into a plan, agreement and conspiracy wilfully and with intent * * * under the color of state law and statutes, to deprive the plaintiffs of the rights, privileges and immunities granted to them as citizens of the

[9] In the same minute entry the district court denied Police Major Willie's motion to dismiss on the ground that there remained "a genuine issue as to material facts in connection with" his activities.

[10] The Louisiana officials were named as defendants but not served with process (R. 12).

> United States by the laws and Constitution of the United States and in particular, the First, Fourth and Fourteenth Amendments thereof.

The arrests and seizures of October 4 were alleged to have been effected "in pursuance of [the] conspiracy." The only factual basis for the conclusory charge of conspiracy on the part of Senator Eastland and Mr. Sourwine was the allegation upon "information and belief" that the issuance of the subpoenas for the Senate Subcommittee was also "in furtherance of the * * * conspiracy * * *" (R. 7).

The district court denied petitioners' motion for a preliminary injunction and dismissed so much of their complaint as sought permanent injunctive relief. Noting that "this Court may not enjoin a Congressional committee from pursuing its activities" (R. 13), the court held that granting the relief sought "would contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this court" (R. 15). Thereafter, on the basis of uncontroverted affidavits showing that respondents had had nothing to do with the alleged conspiracy, the district court, without opinion, granted respondents' motion for summary judgment (R. 17).

On appeal, the district court's decision was affirmed *per curiam* (per Burger and McGowan, J.J.).[11] With regard to the prayer for injunctive relief, the court of appeals noted that although the complaint alleged that SCEF's records were in the possession of Eastland and Sourwine, the opposing affidavits

[11] Senior Circuit Judge Washington did not participate in the decision (R. 109).

established that the documents were in the possession of the Senate Subcommittee. Since an injunction addressed to Eastland or Sourwine could not affect the Subcommittee's use of the records, the court affirmed the dismissal of the request for injunctive relief because "'a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.'" R. 104–105; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 550.

In affirming the judgment for respondents on the claim for damages, the court of appeals rested on the doctrine of legislative privilege, holding that "the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities" (R. 105, footnote omitted). Focusing upon "the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it" (R. 106), the court of appeals held that the Subcommittee's subsequent formal approval of the subpoenas served "to keep appellees' acts in pursuing the Subcommittee's long-standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena" (R. 106–107). The court rejected petitioners' argument that their charge of conspiracy with State officials stripped respondents of their legislative privilege, pointing out that "the conduct of which appellants complain (appellees' activities pursuant to the

subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities" (R. 108–109, footnote omitted).[12]

SUMMARY OF ARGUMENT

The gravamen of petitioners' complaint is that certain of their records were seized illegally by Louisiana State officials, from whom the records were subpoenaed by the Internal Security Subcommittee of the United States Senate. The primary issues arising out of the seizure have been or are being decided in other litigation. Thus, the propriety of the seizure is not in issue here—the Louisiana State courts have held it invalid, and this Court has enjoined further prosecution of respondents under the Louisiana anti-subversive statutes under color of which the seizure had been made. *Dombrowski* v. *Pfister,* 380 U.S. 479. Similarly, this suit does not concern the liability of the Louisiana State officials to respond in damages for the illegal seizure; that question is being litigated in the federal courts in Louisiana, which have held that all but one of the officials must go to trial on that question.

The only issue in this case is whether, by alleging conspiratorial complicity in the seizure, petitioners may secure damages from and an injunction against the United States Senator and Chief Counsel who

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[12] The court also rejected the argument that respondent Sourwine was not entitled to legislative privilege, relying, *inter alia*, on *Barr* v. *Matteo*, 360 U.S. 564, 572–573 (R. 109, n. 11). Without passing upon the propriety of the summary judgment, the court of appeals noted that it "might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105).

executed the Senate Subcommittee's subpoenas of the records. We urge that this ancillary suit against the federal legislative officials must fail.

I

Petitioners' claim for damages was based upon respondents' alleged participation in a conspiracy to seize their records. Respondents showed (by deposition and affidavit) that they had had nothing whatever to do with any conspiracy or with the seizure of petitioners' records, and petitioners failed to challenge that showing by affidavit or as otherwise provided by Rule 56 of the Federal Rules of Civil Procedure. Upon this record, therefore, there was no genuine issue of material fact, and the district court properly granted summary judgment. Rule 56(e), Fed. R. Civ. P.

II

Even if the affidavits and depositions were insufficient to warrant summary judgment in a case involving private defendants, respondents were entitled to judgment. For the only factual allegation purporting to connect respondents with the alleged conspiracy was that, as Chairman and Chief Counsel of the Senate Internal Security Subcommittee, they had issued subpoenas directed to the State officials to obtain petitioners' records. But respondents' conduct in issuing the subpoenas was well within the perimeter of their official duties as United States Senator and Chief Counsel. Accordingly, as the court of appeals held,

they are immune from liability for that conduct, under the Speech and Debate Clause of the Constitution (Article I, Section 6) and the doctrine of legislative immunity.

III

Petitioners sought an injunction against Senator Eastland and Chief Counsel Sourwine to prevent the use of the seized records and copies of such records, and to compel return of the records and copies to petitioners. The courts below properly denied this request, since injunctions directed against Eastland and Sourwine would be ineffective to control the disposition of the copies of the records, all of which copies are (and have been) in the possession and control of the Senate Subcommittee.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR RESPONDENTS, SINCE PETITIONERS FAILED TO CONTROVERT RESPONDENTS' SHOWING THAT THEY HAD NOT PARTICIPATED IN THE ALLEGED CONSPIRACY

Petitioners' complaint alleged generally that respondents and the State officials had "entered into a plan, agreement and conspiracy wilfully and with intent * * *" to deprive petitioners of certain constitutional rights (R. 4). Specifically, petitioners alleged that the searches of October 4 had been undertaken "pursuant to this conspiracy" (R. 4–5) and, on "information and belief," that respondents' issuance of the Senate Subcommittee subpoenas was

"part of the above described conspiracy * * *" (R. 7).

In support of their motion for summary judgment, respondents submitted affidavits which established, in direct contradiction to the allegations of the complaint, that they had no connection with the searches and that their subpoenaing of the records had not been part of any "plan, agreement or conspiracy" with the State officials. Thus, Senator Eastland and Mr. Sourwine each stated under oath (R. 35–36, 43):

> I had nothing whatever to do with the acquisition of the SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

Indeed, when deposed by petitioners, Mr. Sourwine revealed that the State officials had never informed him of their plan to acquire SCEF's records by means of search warrant rather than subpoena (R. 47):

> * * * As a matter of fact, I did not know until after the material had been secured that it had not been secured by subpoena.

Respondents also filed affidavits of the State officials responsible for the searches; these confirmed the fact that Senator Eastland and Mr. Sourwine had had no prior knowledge of the State officials' decision to proceed by search and arrest warrants and that re-

spondents had not been parties to any agreement or "conspiracy." Thus, James Pfister, Chairman of the Louisiana Committee, and Major Russell Willie of the Louisiana State Police averred that they had never met nor had any communication with Senator Eastland or Mr. Sourwine until the service on them of the Senate Subcommittee's subpoenas on October 5, 1963 (R. 62–63, 80–81). Similarly, Thomas Burbank, the head of the Louisiana State Police, swore that he had had no communication with Senator Eastland or Mr. Sourwine with respect to any action contemplated or proposed by the State Police or Louisiana Committee (R. 77). And Jack N. Rogers stated that his only contact with either respondent was his request of July 17, 1963 to Mr. Sourwine for certain information from the public records of the Senate, his statement at that time that the Louisiana Committee "might subpoena the records of the SCEF," and his request in mid-September for help in evaluating the material "in the event that the Joint Committee subpoenaed the records" (R. 71). He also made it clear that "at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against SCEF and its officers by way of arrest and search warrants rather than by way of subpoena" (R. 74). All of the State officials stated flatly and unequivocally that respondents had had nothing to do with the seizure of petitioners' records, and that there was no agreement, concert of action or conspiracy between the State officials and respondents (R. 62–63, 74, 77, 80–81).

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The affidavits filed by petitioners in opposition to respondents' motion for summary judgment asserted no facts controverting the evidence assembled in support of that motion. Indeed, petitioners' affidavits did not even purport to traverse a single statement of fact in the affidavits filed on behalf of respondents. Petitioners' affidavits simply described the searches and arrests (R. 20–31) and raised a question as to whether the Senate Subcommittee's approval of the subpoenas had been unanimous. Although petitioners had available the panoply of discovery procedures afforded by the Federal Rules, they chose only to depose Mr. Sourwine; and his deposition fully confirmed the assertions in the affidavits previously filed. Moreover, petitioners neither impeached the credibility of respondents or their affiants nor stated reasons why they could not "present by affidavit facts essential to justify * * * opposition" to the motion, as required by Rule 56(f), Fed. R. Civ. P.[13]

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[13] At the hearing in March 1964, on respondents' motion for summary judgment, petitioners asked for a continuance to permit discovery procedures relating to a letter sent by former Senator Keating to Senator Eastland.

The district court properly denied that request. Senator Keating's letter had been written on January 30, 1964, and petitioners' counsel were aware, at least as early as February 18, of a newspaper report of the letter on February 6 (R. 30). Since petitioners did not indicate why they had taken no steps to secure an affidavit from Senator Keating in the interim, there was no reason for the district court to grant a continuance of a hearing set for the day of the request.

In any event, Senator Keating's letter—which is set out at p. 26, n. 16, of the Petition for Certiorari, is of no relevance to this case. The letter expressly confirms the fact that the Subcommittee had "ratified this action"—*i.e.*, the subpoenaing

Thus, respondents' showing that they had not participated in any agreement, concert of action or conspiracy with regard to the searches—and, specifically, that their subpoenaing of the records had not been pursuant to any such agreement or conspiracy—was uncontradicted and unchallenged save by the allegations of the complaint. Respondents, therefore, were entitled to summary judgment under Rule 56(e), Fed. R. Civ. P.:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Erickson v. *United States,* 340 F. 2d 512 (C.A. 5).[14]

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of SCEF's records. Acknowledging that other members of the Subcommittee had "approved" the subpoenas, Senator Keating objected to the fact that he did not have an opportunity to express his dissent. His objection has no relevance here.

[14] It would be peculiarly inappropriate to permit the allegations of petitioners' complaint to contravene the sworn affidavits submitted in behalf of respondents since the complaint does not satisfy the requirement of Rule 56(e) that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The complaint in this suit was verified by Walter Dillon, an attorney for petitioners, who admitted that his verification had been made on the basis of information furnished by other attorneys and the affidavits of Messrs. Dombrowski and Brener (R. 96). Rule 56 does not permit consideration of such a complaint, verified by counsel "who obviously did not have personal knowledge of most of

We emphasize that, although petitioners' suit was founded on respondents' alleged participation in an alleged conspiracy, the complaint contained nothing but the bare conclusory allegation of respondents' participation. In contrast, respondents' motion for summary judgment was supported not with "naked denials" (Pet. Br. 96), but with affirmative recitals of the facts surrounding the incidents upon which petitioners' suit was based. The affidavits of all the persons who had knowledge of the facts conclusively showed that neither Senator Eastland nor Mr. Sourwine had had anything to do with the actions of the Louisiana Joint Legislative Committee in obtaining petitioners' records. Petitioners were unable to make any showing to the contrary and accordingly were not entitled to a trial of fact.[15]

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the things that he referred to, and whose testimony would not have been admissible in evidence at the trial." *Hoston* v. *J. R. Watkins Co.*, 300 F. 2d 869, 870 (C.A. 9). Insofar as the complaint rested on "information and belief", it is of course insufficient under Rule 56.

We do not, as petitioners suggest (Pet. Br. 96), ask this Court to "overturn" any "conclusion" of the court of appeals. The court of appeals found it unnecessary to reach the question of whether the record would have warranted summary judgment, apart from considerations of legislative immunity (R. 105).

[15] With their motion for summary judgment, respondents submitted a Statement of Material Facts Pursuant to Local Rule 9(h) (R. 83–94). Since petitioners did not submit the countervailing "statement of genuine issues" provided for by Rule 9(h), the district court was entitled to "assume that the facts as claimed by the moving party [were] admitted to exist

Respondents' "detailed affidavits, categorically denying the existence of such a conspiracy * * * were sufficient to require the plaintiffs to 'set forth specific facts showing that there is a genuine issue for trial' under the recent amendments to Rule 56(e) * * *." *Scolnick* v. *Lefkowitz,* 329 F. 2d 716, 717 (C.A. 2). Petitioners failed to controvert respondents' showing in any respect. Their affidavits did not traverse respondents' affidavits. They did not—as they had in the Louisiana litigation [16]—cast any doubt on the credibility of respondents or their supporting affiants. Given the opportunity, by discovery, to develop facts which would show the existence of a triable issue, they deposed Mr. Sourwine and failed to develop anything but further substantiation of respondents' position. See *Lundeen* v. *Cordner,* 356 F. 2d 169 (C.A. 8); *Orvis* v. *Brickman,* 196 F. 2d 762, 766 (C.A.D.C.), affirming 95 F. Supp. 605. Petitioners' only response to respondents' showing was an assertion that the facts *which respondents had adduced* supported an inference of conspiracy. But petitioners make this showing only by restating, with critical omissions, the facts which respondents did prove. They suggest, for example, that an inference of con-

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without controversy * * *." Respondent's Statement recited (R. 93):

"Neither Senator James O. Eastland nor Mr. J. G. Sourwine had anything whatsoever to do with the acquisition of the SCEF material by the Joint Committee of the Louisiana Legislature or with the preparation, issuance or execution of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee."

[16] See Pet. Br. App. 134.

spiracy may be raised by the fact of "private" discussions between Sourwine and Rogers (Pet. Br. 97); but no such inference is raised by the fact of discussions in which Rogers asked Sourwine for information regarding SCEF and informed Sourwine that the Louisiana Committee intended to subpoena SCEF's records (R. 71). Nothing in respondents' recital of the facts is inconsistent with the avowals that they had nothing to do with any agreement or conspiracy regarding petitioners. Petitioners say (Pet. Br. 104) they find "incredible" respondents' proof that they had no prior knowledge of the October 4 searches. Petitioners' expression of disbelief does not constitute a form of proof."

The short of the matter is that respondents have shown that the conspiracy upon which the suit is based does not exist. Petitioners have not adduced any evidence casting any doubt upon that showing, and have not demonstrated any possibility of their being able to cast doubt upon it at trial. "'[A]n opposing party who has no countervailing evidence and who cannot show that any will be available at the trial [is not] entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial.'" *International Longshoremen's and Warehousemen's Union* v. *Kuntz*, 334 F. 2d 165, 169, n. 5 (C.A. 9), quoting 6 Moore's *Federal Practice* ¶ 56.15[3], pp. 2129–2130

[1] Compare the dismissal of the Louisiana suit against Superintendent Burbank in the face of petitioners' contention that it was "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank" (R. 100).

(1953). Denial of respondents' motion for summary judgment on this record would have frustrated "[t]he very mission of the summary judgment procedure [, which] is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." [18] Rule 56(e) does not "derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary." [19] On the record before the district court, there was no "genuine issue" as to respondents' participation in the conspiracy; therefore, the district court properly granted summary judgment for the respondents. See *S & S Logging Co.* v. *Barker,* 366 F. 2d 617, 623 (C.A. 9); *Chafin* v. *Pratt,* 358 F. 2d 349, 354 (C.A. 5); *Norton* v. *McShane,* 332 F. 2d 855, 861 (C.A. 5), certiorari denied, 380 U.S. 981; *Preble* v. *Johnson,* 275 F. 2d 275, 279 (C.A. 10); *Dyer* v. *MacDougall,* 201 F. 2d 265, 269 (C.A. 2).

II. THE ONLY CONDUCT OF RESPONDENTS OF WHICH APPELLANTS COMPLAIN—THE ISSUANCE OF SENATE SUBPOENAS—WAS WELL WITHIN THE PERIMETER OF RESPONDENTS' OFFICIAL DUTIES; ACCORDINGLY, THE DOCTRINE OF LEGISLATIVE IMMUNITY PROTECTS THEM FROM LIABILITY IN DAMAGES

As argued above, we think the district court was correct in rendering summary judgment for respondents,

[18] Notes of Advisory Committee on Rules, reproduced as notes to 28 U.S.C.A., Fed. R. Civ. P. 56 (1966 Cumulative Supp.).

[19] *Ibid.*

since their uncontradicted affidavits show that they did not participate in any concert of action, agreement or conspiracy with the State officials. Accordingly, in our view the Court need not reach the issue of legislative immunity. *Peters* v. *Hobby,* 349 U.S. 331, 338; *Communist Party* v. *Catherwood,* 367 U.S. 389. If, however, the Court believes it necessary or appropriate to reach that issue, we submit that the court of appeals correctly held that, on the uncontroverted facts of record, the doctrine of legislative immunity precludes liability for damages here. For, as the court of appeals recognized, the only part that respondents allegedly played in the alleged conspiracy was their issuance of subpeonas of the Senate Internal Security Subcommittee for SCEF's records. Since this conduct was well within the scope of their official duties, we show here, the Speech and Debate Clause of the Constitution and the doctrine of legislative immunity preclude the imposition of liability for damages based upon that conduct.

1. Article I, Section 6, of the Constitution (*supra,* pp. 2–3) directs that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." This legislative privilege is designed not for the protection of the legislators personally, "'but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.'" *Kilbourn* v. *Thompson,* 103 U.S. 168, 203 (quoting *Coffin* v. *Coffin,* 4 Mass. 1, 27); *Tenney* v. *Brandhove,* 341 U.S. 367, 373–374; cf. *Bond* v. *Floyd,* 35 U.S. Law Week 4038, 4043 (Dec. 5, 1966). As this Court noted last Term, "Since

the Glorious Revolution in Britain and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson,* 383 U.S. 169, 178. Although the doctrine of legislative immunity thus has its roots in the express language of the Constitution, the underlying considerations are the same as those that gave rise to the judicially formulated doctrines of immunity for those associated with the judicial process (*e.g., Bradley* v. *Fisher,* 13 Wall. 335; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503) and to officers of the Executive Branch (*e.g., Spalding* v. *Vilas,* 161 U.S. 483; *Barr* v. *Matteo,* 360 U.S. 564).

Only three suits involving legislative immunity have reached this Court, and in each of the three the Court has upheld the privilege and admonished that it be construed "liberally, that the full design of it may be answered." *Kilbourn* v. *Thompson, supra,* 103 U.S. at 203; *Tenney* v. *Brandhove, supra,* 341 U.S. at 373–374; *United States* v. *Johnson, supra,* 383 U.S. at 180.

The immunity from civil or criminal prosecution attaches not only to speech or debate as such but also "to things generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn* v. *Thompson, supra,* at 204). In particular, the immunity applies to resolutions offered, to the act of voting, to written reports presented in the legislature by its committees (*ibid.*) and to investigations by standing or special committees of the legislature (*Tenney* v. *Brandhove, supra,* at 377–

378). Allegations or proof of conspiracy cannot deprive the legislator of his immunity from civil and criminal prosecution for legislative activities. *United States* v. *Johnson, supra.* It also is settled that this legislative immunity applies to suits, like this one, brought under the Civil Rights Act, alleging a conspiracy by two or more persons to deprive another of constitutional rights, for Congress did not intend by that Act to "subject legislators to civil liability for acts done within the sphere of legislative activity." *Tenney* v. *Brandhove, supra,* at 376.[20]

Thus, petitioners' suit here is barred by the doctrine of legislative privilege unless respondents' conduct was "of an extraordinary character," (*Kilbourn* v. *Thompson, supra,* at 204), outside the "sphere of legislative activity" (*Tenney* v. *Brandhove, supra,* at 376).[21]

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[20] To be sure, as petitioners urge, the antecedents of the Speech or Debate Clause were, as this Court said in *Johnson*, designed to protect legislators against an overbearing executive—the then-current threat to legislative integrity. But the language of the clause, like its spirit, calls equally for protection of legislators from private persons who would invoke the aid of the judiciary in controlling the conduct of the legislature. The crucial question is whether a judge may properly impose sanctions on legislators for the conduct of their legislative functions. See Yankwich, *The Immunity of Congressional Speech*, 99 U. Pa. L. Rev. 960, 966. Accord, *Tenney* v. *Brandhove*, 341 U.S. 367.

[21] The Court indicated, in *Kilbourn* v. *Thompson*, the sort of "extraordinary" conduct "for which the members who take part in the act may be held legally responsible":

"* * * If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the

2. The test of whether conduct is protected by the doctrine of legislative immunity obviously is not whether that conduct was legal or illegal, for a suit against a member of Congress will always be based upon an allegation that he has committed an illegal act. Nor will an allegation that the conduct was unconstitutional, or in furtherance of a conspiracy, suffice to strip away the immunity. See *e.g., Tenney* v. *Brandhove, supra,* at 369; *United States* v. *Johnson, supra.* Similarly, the legislator's motives or purposes are irrelevant to the application of the privilege. For example, in *Tenney* v. *Brandhove, supra,* at 377, this Court ruled:

> The claim of an unworthy purpose does not destroy the privilege. * * * The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. * * *

Accord, *United States* v. *Johnson, supra,* at 180.

The test is simply whether the act is such as is "generally done in a session of the House by one of

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example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." 103 U.S. at 204–205.

its members in relation to the business before it" (*Kilbourn* v. *Thompson, supra,* at 204), or whether the legislators "were acting in a field where legislators traditionally have power to act" (*Tenney* v. *Brandhove, supra,* at 379). A legislator loses immunity only for conduct "that is in no wise related to the due functioning of the legislative process." *United States* v. *Johnson, supra,* at 172.

Plainly, Senator Eastland's conduct was well within the "sphere of legitimate legislative activity." The only fact alleged in the complaint to tie him to the conspiracy was his authorization of the issuance of subpoenas for documents which his Subcommittee's Chief Counsel had advised were relevant to the Subcommittee's inquiry. As this Court has recognized, "Investigations, whether by standing or special committees, are an established part of representative government." *Tenney* v. *Brandhove, supra,* at 377. And a legislator's conduct in regard to such investigations is protected by immunity, at least unless it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.,* at 378.

Senator Eastland's authorization of the issuance of the subpoenas here was well within the traditional power of a chairman of a Senate subcommittee. Indeed, the issuance of subpoenas by the chairman is expressly authorized by the Rules of the Internal Security Subcommittees of the Judiciary Committee of the United States Senate, which provide:

> Subpoenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the subcommittee chair-

> man or by any other member of the subcommittee designated by him.[22]

This Subcommittee rule implements S. Res. 366, 81st Cong., 2d Sess. (1950), which provides (Sec. 2):

> * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.[23]

Petitioners contend that the doctrine of legislative immunity should not apply here because the issuance of the subpoenas upon the instructions of the Chairman had not been authorized by the full Subcommittee (Pet. Br. 70–73). In appeals from convictions for contempt of Congress, the Court of Appeals for the District of Columbia Circuit has twice held, subsequent to the issuance of the subpoenas here, that Senate Resolution 366 requires the entire Subcommittee, rather than simply the Chairman, to decide who shall be subpoenaed. *Shelton* v. *United States,* 327 F. 2d 601 (C.A.D.C. 1963); *Liveright* v. *United States,* 347 F. 2d 473 (C.A.D.C. 1965). But this Court need not decide whether the Subcommittee could properly delegate to its Chairman that function, as it apparently attempted to do in its Rules. For it is clear that the sphere of valid legislative activity is substantially narrower than the sphere of legislators' personal immunity. *Kilbourn* v. *Thompson,* 103 U.S. 168; *Tenney* v. *Brandhove,* 341 U.S. 367, 379 (concurring opinion of Mr. Justice Black). Thus, even if (as petitioners contend) the subpoenas were invalid

[22] Rules of Procedure, Rule 2, adopted by the Subcommittee on February 7, 1955, reprinted in the Subcommittee's *Rules of Procedure and Information for Witnesses*, p. 5.

[23] Reprinted in the Subcommittee's Rules, *supra*, pp. v–vi.

for failure to comply with a procedure that has since been held necessary for authorization, it by no means follows that issuance of the subpoenas was so far outside the "mainstream of legislative authority" that petitioners can recover money damages from respondents for their mistaken belief that the Subcommittee practice was valid. As the court below said, construing its own prior holdings, entirely different questions are presented in suits against officers for damages than in proceedings for contempt of Congress (R. 105–106):

> * * * *Shelton*, however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for considering the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.

Indeed, in *Yellin* v. *United States*, 374 U.S. 109, 121–122, this Court emphasized this very distinction, holding that a recusant witness may challenge a committee's breach of its rules in defending against a contempt citation, although that witness "has no opportunity to recover in damages, U.S. Const., Art. I, § 6; *Kilbourn* v. *Thompson*, 103 U.S. 168, 201–205."

In addition, in this case the full Subcommittee subsequently ratified the issuance of the subpoenas on the authority and signature of the Chairman (R. 36–37). This action showed that the Chairman was in fact acting on behalf of the Subcommittee when he issued

the subpoenas. And since the Subcommittee as a whole concededly was competent to issue the subpoenas, the action of the Chairman in issuing them was clearly within the perimeter of his official duties (R. 106–107).[24]

There can be, we submit, no legitimate doubt that Senator Eastland's authorization of the issuance of the Subcommittee subpoenas, and his direction that the subpoenas be implemented, were well within the "sphere of legitimate legislative activity" and that the doctrine of legislative immunity therefore precludes making that conduct the basis of this claim for damages.[25]

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[24] As the court below pointed out, this ratification might not be effective for all purposes (cf. *Shelton* v. *United States*, *supra*, 327 F. 2d at 607), but it is effective to show that respondents' conduct was not outside their legislative duties. Cf. *Gojack* v. *United States*, 384 U.S. 702, emphasizing that prior authorization under a House Committee's rules is essential in the context of a criminal case. Refusing to pass on "the appropriateness of this procedure as a method of conducting congressional business," this Court emphasized that its concern was with "the administration of criminal justice, and specifically the application of the criminal statute which has been invoked" (384 U.S. at 714).

[25] As we have noted above, the only factual allegation in the complaint tying Senator Eastland to the alleged conspiracy was the issuance of the subpoenas (R. 6–7, 2–12). Nor, as we have shown above (*supra*, pp. 19–22), was there any other evidence of record connecting the Senator to the alleged conspiracy. Accordingly, there is no material issue of fact—apart from the issuance of the subpoenas—which would warrant a trial, and petitioners err in suggesting that there are such issues (Pet. Br. 70, n. 63). If, as required by *United States* v. *Johnson*, 383 U.S. 169, the conspiracy alleged in the complaint is purged of elements offensive to the Speech or Debate Clause, there are no factual allegations left to link the respondents here to that conspiracy.

3. As with Senator Eastland, the only facts alleged in the complaint purporting to link Mr. Sourwine with the alleged conspiracy pertain to his part in issuing the subpoenas and securing the documents for the use of the Senate Subcommittee (R. 6–7). Mr. Sourwine, Chief Counsel to the Subcommittee, advised the Chairman that, in his opinion, the records of SCEF included material which would be of interest to the Subcommittee and recommended the issuance of the subpoenas (R. 41). In addition, he had the subpoenas filled in, and served them, pursuant to the Chairman's instructions (R. 41). Again under the Chairman's order, he took possession of the material for the Subcommittee, and later directed the custodian of the records to have them transported to Washington by the return date. Since this conduct was undertaken as part of his duties as Chief Counsel to the Subcommittee (see R. 60), he too is, as the court of appeals held, immune from suit for damages.

In our view, Chief Counsel Sourwine's conduct, within the scope of his duties as an employee and agent of the Senate, is protected by the Speech or Debate Clause. Since Mr. Sourwine was acting for Senator Eastland and the Subcommittee, his privilege derives from theirs. In conducting investigations within the sphere of its legitimate legislative function, Congress necessarily acts through its agents, and an agent, acting within the scope of his authority, should share in the Subcommittee's privilege. Cf. *Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F. 2d 150, 156–157 (C.A. 5).

Kilbourn v. *Thompson, supra,* does not bar application of the legislative privilege to agents of the legislature. In that case, the conduct of the Sergeant-at-Arms was held to be subject to suit for damages because, in attempting to effect an arrest to punish a contumacious witness, he was purporting to perform a judicial function and thus implement congressional conduct which was "outside its legislative role." *Tenney* v. *Brandhove, supra,* 341 U.S. at 377.

In this case, by contrast, the issuance of the subpoenas clearly was within the sphere of the legitimate legislative activities of the Senate and of its Subcommittee.[26] The subpoenas were, moreover, issued in conformity with the Subcommittee's rules, and in accordance with its usual practice (R. 34). Thus, Mr. Sourwine's conduct in filling out and serving the subpoenas was well within the sphere of legitimate legislative activity. Similarly, his actions in looking at the material, determining that it was of interest to the Subcommittee, and recommending that it be subpoenaed were within the normal limits of the duties of a Chief Counsel, and well within the sphere of legitimate legislative activity.

It seems clear that legislative immunity should apply to legislative officials, as well as to the legislators themselves. While none of the three decisions of this Court involving such immunity has so held, the opinion in *Tenney* v. *Brandhove, supra,* 341 U.S. at 378, clearly suggests this result:

[26] The only question as to the validity of the subpoenas was whether the Subcommittee was required to vote on each individual subpoena, or whether it could have and had delegated that function to its Chairman.

> Legislative privilege in such a case [where the defendants are members of a legislature] deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.[27]

The same considerations which have led the courts to extend the doctrines of judicial immunity and official (executive) immunity to subordinate officials of the Judicial and Executive branches counsel application of the rule of legislative immunity to officials of the legislature.[28] Since legislative committees and individual legislators, like judges and heads of Execu-

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[27] *Stockdale* v. *Hansard*, 9 AD. & E. 1, 112 Eng. Reports 1112 (1839), upon which petitioners so heavily rely, is to the same effect: it deprives a legislative agent of legislative privilege only insofar as he is acting outside the legislative sphere. In any event, the decision in *Stockdale* v. *Hansard*, denying the parliamentary privilege to one who privately published papers on parliamentary orders, was overturned by Act of Parliament the very next year. 3 & 4 Vict., c. 9 (1840).

[28] The "traditional arguments in support of immunity" were outlined in *Bauers* v. *Heisel*, 361 F. 2d 581, 590 n. 9 (C.A. 3): "'* * * (1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits [which would require inordinate private record keeping, Bradley v. Fisher, 80 U.S. (13 Wall.) at 349]; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.'"

Note, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953). See also Judge Learned Hand's classic explanation in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949, which was adopted by this Court in *Barr* v. *Matteo*, *supra*, 360 U.S. at 571–572.

tive departments, are able to fulfill their duties only with the assistance of counselors and agents, those assistants, like subordinate executive officers and those associated with the judiciary,[29] should share their superiors' immunity. *E.g. Barr* v. *Matteo,* 360 U.S. 564. Neither the officer's rank nor his motivation affects the applicability of the law of privilege. The test is whether the acts complained of have "more or less connection with the general matters committed by law to [the officer's] control or supervision, [and are not] manifestly or palpably beyond his authority," and that the acts are pursuant to "a decision which it is necessary that these officers be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability." *Spalding* v. *Vilas,* 161 U.S. 483; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503; *Barr* v. *Matteo,* 360 U.S. 564; *Norton* v. *McShane,* 332 F. 2d 855, 859, 862 (C.A. 5), certiorari denied, 380 U.S. 981; *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655, 659 (C.A. 2), certiorari denied, 374 U.S. 827; *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.

Application of these settled criteria to the facts of this case make it plain that Sourwine's conduct is immune from suit for damages. In communicating to

[29] It is for similar reasons that prosecutors are held to partake of judicial immunity: "The reasons are clear: his primary responsibility is essentially judicial * * *; his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest." *Bauers* v. *Heisel,* 361 F. 2d 581, 589–590 (C.A. 3); see *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

Senator Eastland his advice that the SCEF records would be of interest to the Senate Subcommittee "in pursuance of its investigative functions" (R. 41), and in carrying out the Chairman's instructions with regard to the subpoenas, which were in apparent accord with the Subcommittee rules and usual practice, Sourwine was acting with regard to matters generally committed to his discretion and control as Chief Counsel to the Senate Subcommittee (see R. 60). Clearly, he did nothing "manifestly or palpably beyond his authority." For this conduct, therefore, he is immune from civil liability. *Barr* v. *Matteo, supra*.[30]

[30] We think it clear that the doctrine of immunity protects federal officials from suits under the Civil Rights Act as well as from suits founded on common law causes of action, as was held in *Gibson* v. *Reynolds*, 172 F. 2d 95 (C.A. 8), certiorari denied, 337 U.S. 925. Compare *S & S Logging Co.* v. *Barker*, 366 F. 2d 617, 622 (C.A. 9), holding the doctrine applicable in a suit founded on the antitrust laws. Although the Civil Rights Act was designed for use against State officials, it has been held that State legislators (*Tenney* v. *Brandhove*, *supra*) and State judges and quasi-judicial officers (*e.g.*, *Bauers* v. *Heisel*, 361 F. 2d 581 (C.A. 3)) can raise the defense of immunity in Civil Rights Act cases; it would, plainly, be anomalous to deny that defense to federal officers. Cf. *Francis* v. *Crafts*, 203 F. 2d 809, 812 (C.A. 1), certiorari denied, 346 U.S. 835, where the court said:

"Certainly it would be absurd to hold, in the application to the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators, in respect to immunity for civil liability for the acts done in their official capacity."

Since State legislators are immune from Civil Rights Act suits, *a fortiori* federal legislators, and federal legislative officials, like Mr. Sourwine, have the same immunity. This immunity was well established, both in England and in the United States, before enactment of the Civil Rights Act. Congress did not intend by that enactment to abolish the long standing privilege. Cf. *Tenney* v. *Brandhove*, *supra*.

Petitioner's contention (Pet. Br. 70–73) that Sourwine's service of the subpoenas was outside his authority and therefore unprivileged is based upon a misreading of *Wheeldin* v. *Wheeler,* 373 U.S. 647. In that case, there were two petitioners, Wheeldin and Dawson. As to Wheeldin, who had been subpoenaed on the authority of the Committee Chairman (Pet. Br. 72–73, n. 65; Br. for Resp. in *Wheeldin,* p. 23, n. 20), the Solicitor General did argue that Wheeler was immune from suit. Br. for Resp. in *Wheeldin,* pp. 23–30. Wheeldin's motion for leave to withdraw his petition for certiorari was granted by this Court when it decided the case. 373 U.S. at 648, n. 1. Also to petitioner Dawson, the Solicitor General conceded that the dismissal of the complaint could not be upheld on the doctrine of official immunity only because "Dawson's complaint, which must be construed most favorably to the plaintiff, can be read to allege that no member of the Committee even attempted to delegate the Committee's subpoena power to Wheeler" (Br. for Resp. in *Wheeldin,* p. 31). Such, of course, is not the situation here, where the Chairman signed the subpoenas, and Sourwine acted pursuant to his express authority and directions and in apparent accord with the Subcommittee rules and usual practice. See, *supra,* pp. 32–34.

III. THE COURT BELOW PROPERLY REFUSED TO ISSUE AN INEFFECTIVE INJUNCTION ATTEMPTING TO CONTROL RESPONDENTS' CONDUCT WITH RESPECT TO MATERIAL NOT IN THEIR POSSESSION

Petitioners sought preliminary and permanent injunctions restraining respondents from "using"

SCEF's records, and compelling them to return the records (and all copies thereof) to petitioners. In response to the application for preliminary relief, respondents filed affidavits which established that the originals of the records were being returned to the persons from whom they had been subpoenaed, and that neither the originals nor the copies of the records were, or had ever been, in their personal possession, but were and had been in the "custody, possession and control" of the Senate Internal Security Subcommittee.[31] These affidavits were corroborated by a formal resolution whereby the Subcommittee "incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee" (R. 103).

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[31] Senator Eastland's affidavit reads, in pertinent part (R. 35):

"I do not now have in my personal possession nor have I ever had in my personal possession either in the District of Columbia, or in the State of Mississippi or anywhere else, any of the documents, records or articles referred to in the complaint.

"All such documents, records and articles, excepting those which have been returned to the Joint Legislative Committee on Un-American Activities of the State of Louisiana from which they were subpoenaed by the Subcommittee on Internal Security are now in the custody, possession and control of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate and are being evaluated pursuant to the resolution adopted by the Subcommittee, November 14, 1963, a copy of which resolution is attached hereto and made part hereof as Exhibit A."

Chief Counsel Sourwine's affidavit reads, in pertinent part (R. 41–43):

"Immediately following the service of the subpoenas duces tecum on October 5, 1963, I took possession, on behalf of the Senate Internal Security Subcommittee, of all the SCEF material then in the hands of the Louisiana State Committee. I

The courts below properly refused to issue an injunction requiring respondents to return the copies of

arranged with Colonel Thomas D. Burbank, Superintendent of the Louisiana State Police, for him to hold this material as custodian for the Senate Committee. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Committee's offices in Washington, D.C.

"* * * It soon became apparent that there was a substantial quantity of material which could not reasonably be expected to be of any value to the Senate Subcommittee in its investigations. This material was promptly prepared for shipment and returned to the Louisiana Committee, being shipped on November 8, 1963.

"On November 14, 1963, the Internal Security Subcommittee formally considered the matter of evaluation and disposition of the material secured under subpoena from the Louisiana Committee, and approved a resolution ordering that all the material be placed in the Subcommittee's record by reference, that it be photostated as speedily as possible, that upon completion of photostating the originals be returned to the Louisiana Committee, and that a task force of five Senators undertake the work of evaluating the material to determine which items should be placed in the record verbatim. * * *

"Work under this resolution is proceeding, and it is anticipated that additional material will be shipped back to the Louisiana Committee each week until all of the material obtained under the subpoena has been returned.

"The material in the possession of the Senate Internal Security Subcommittee relating to the Southern Conference Educational Fund, Inc., is being studied, evaluated, and used by that Subcommittee pursuant to its duty to make a complete and continuing study and investigation of the extent, nature, and effect of subversive activities in the United States and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement. The material is directly relevant to these matters. The material relates not only to the activities and personnel of the Southern Conference Educational Fund, Inc., but also to the connections between that organization and other organizations which appear to be Communist, Communist dominated, or Communist-front organizations, such for example as the Fair Play for Cuba Committee."

the records to petitioners.[22] For those copies are in the possession of the Subcommittee, and respondents could not effect their return to petitioners. A court will not require a person to do what it is not in his power to do. See *Two Guys* v. *McGinley,* 366 U.S. 582, 588; *Z. & F. Assets Realization Corp.* v. *Hull,* 31 F. Supp. 371 (D. D.C.), affirmed, 114 F. 2d 464 (C.A.D.C.), affirmed, 311 U.S. 470; *Citizens Protective League* v. *Clark,* 155 F. 2d 290, 292 (C.A.D.C.), certiorari denied, 329 U.S. 787; *Schwimmer* v. *United States,* 232 F. 2d 866, 868 (C.A. 8), certiorari denied, 352 U.S. 833. The decree petitioners seek, which would expend itself on the Subcommittee's agent and member, cannot grant the relief desired because it cannot prevent the Subcommittee from implementing its resolution concerning SCEF's records. See *Williams* v. *Fanning,* 332 U.S. 490, 494; *Hynes* v. *Grimes,* 337 U.S. 86, 96; *Blackmar* v. *Guerre,* 342 U.S. 512.

Similarly, insofar as petitioners sought to restrain respondents from disclosing the contents of the records, their complaint fails because the records are open to the Subcommittee. As the court of appeals pointed out, "Disclosure of the documents in the course of the Subcommittee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents" (R. 104). In this regard, too, the court below properly followed the established rule "that a court of equity may refuse

[22] Since the original records have been returned (*supra*, p. 12), all that is in issue here is the propriety of requiring respondents to return the copies of the records—which were made at the direction and for the use of the Subcommittee.

to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff." *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 550. Petitioners may desire a useless injunction, but it is not the function of a court to gratify such wishes. It long has been settled that useless injunctions will not issue. Spelling, *Injunctions* (1926), states the familiar rule (p. 107):

> Whatever the merits of the applicant's case, as shown in his complaint or other initial presentation, it may appear wholly impracticable to aid him by injunction, for one or more of a variety of reasons of circumstance, environment or condition. And inasmuch as vain acts are in the same category as erroneous action, courts will in such case refuse to grant the process. * * *

So much petitioners appear to concede (Pet. Br. 109–110). To circumvent their difficulty, they make two arguments (Pet. Br. 108–110): *first,* that the district court should not have considered the affidavits showing that the records in issue were in the possession of the Subcommittee, and, *second,* that even if this fact was properly taken into account, the district court should have held a hearing to determine whether issuance of an injunction against respondents would have been futile. Neither of these contentions is meritorious.

1. There was no reason for the district court to close its eyes to the affidavits' showing that those whose control of the documents petitioners sought to enjoin did not have control of the documents—that the records were in fact in the "custody, possession and con-

trol of the Internal Security Subcommittee" (R. 35). Citing *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, petitioners argue that the court should have ignored the affidavits and considered only their complaint, which was "all that was properly before [the court] on the motion to dismiss * * *" (Pet. Br. 108). Petitioners' argument is beside the point. The district court was not considering a motion to dismiss—it was considering petitioners' motion for a preliminary injunction and respondents' opposition thereto.[33] It is settled that in ruling on a prayer for a preliminary injunction "the court may receive and consider both affidavits and other documents which are the equivalent of affidavits." *United States* v. *Fox*, 211 F. Supp. 25, 30 (E.D. La.); *Andrews* v. *Chesapeake and Pot. Telephone Co.*, 89 F. Supp. 176, 177 (D. D.C.); 7 Moore's *Federal Practice* ¶65.04[3]. "[A] preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf * * *." *Sims* v. *Greene*, 161 F. 2d 87, 88–89 (C.A. 3); *Carpenters' District Council* v. *Cicci*, 261 F. 2d 5, 8 (C.A. 6).

It was entirely appropriate for the court, having determined that petitioners could not support their application for an injunction, to dismiss finally that portion of the complaint which sought permanent injunctive relief. "[I]f the bill be obviously devoid

[33] See the district court docket entries (R. 97). Respondents' motion for dismissal was not filed until January 28, 1964, more than a month after the district court, on consideration of the motion for and opposition to issuance of a preliminary injunction, had dismissed that portion of the complaint which sought injunctive relief.

of equity upon its face, and such invalidity be incapable of remedy by amendment * * * we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed." *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485, 495; *Standard Oil Co. of Texas* v. *Lopeno Gas Co.*, 240 F. 2d 504, 510 (C.A. 5).[34]

2. There was no need for the district court to hold a hearing to determine whether issuance of an injunction would have been futile. Undisputed affidavits are sufficient to support denial of a request for injunctive relief. Evidentiary hearings on motions for preliminary injunctions are appropriate only where necessary "to resolve material conflicts in affidavits * * *." *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 207 F. 2d 190, 198 (C.A. 9); compare *Carpenters' District Council* v. *Cicci*, 261 F. 2d 5, 8 (C.A. 6), and *Sims* v. *Greene*, 161 F. 2d 87, 88–89 (C.A. 3).[35] In this case, however, there was no basis for hearing, for there

[34] In *Mast, Foos* this Court recognized that dismissal of a bill can be supported by affidavits. 177 U.S. at 495.

[35] *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, restates the established rule "that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff." 300 U.S. at 550. That decision does not, as petitioner would have it, require that a hearing be held before a court may do so. The Court's opinion simply points out that "Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case * * *" (*id.*, at 551); nothing in the decision suggests that where, as here, the "special circumstances" of the case are clear from the affidavits, the court nonetheless must hold a hearing upon the propriety of issuing an injunction.

was no conflict. Respondents' affidavits and the Subcommittee resolution established beyond the possibility of doubt that the records in question were in the custody of the Senate Subcommittee—that, indeed, they never had been in the personal possession of the respondents. Petitioners did not in any way traverse that showing.[36] Even now petitioners do not deny that the records are in the Subcommittee's possession. Since the undisputed affidavits showed that the records were beyond the reach of the respondents, there was no reason for the district court to hold a hearing.

Petitioners have not—even at this point—given any indication that there were "material conflicts" which should have been resolved at a hearing. Petitioners suggest that they should have been afforded a hearing in order to litigate "whether the individual respondents retained copies of the seized documents * * * and whether they had given these copies to other individuals throughout the country" (Pet. Br. 110). There is, however, no need to litigate that issue, for the affidavits show that the only copies of SCEF's documents were made by the Senate Subcommittee pursuant to its resolution of November 14, 1963 (see *supra*, 42–43, n. 31), and are in the Subcom-

[36] Insofar as the complaint rested on petitioners' "information and belief," it plainly was inadequate to contravene respondents' affidavits. An "application for a preliminary injunction cannot be based on information and belief, but must be based on facts * * *." *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C.A. 7). In any event, it is clear on the record that the SCEF's records were at all pertinent times in the Subcommittee's custody, certainly after its November 14 resolution, which was adopted before respondents were served with petitioners' motion for a preliminary injunction.

mittee's possession (R. 35). Moreover, petitioners had an opportunity to explore these questions at Sourwine's deposition but apparently developed no relevant information.

In sum, the Subcommittee has had exclusive possession of the records; it alone can dispose of them. Petitioners have not sued the Subcommittee, and they cannot enjoin respondents' control over the documents since respondents do not have, and have not had, any such control.[37] For these reasons, the court below correctly sustained the district court's dismissal of petitioners' claim for injunctive relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted.

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[37] Petitioners could not have sued the Committee to govern its disposition of SCEF's records. See *Hearst* v. *Black*, 87 F. 2d 68, 71–72 (C.A.D.C.); *Mins* v. *McCarthy*, 209 F. 2d 307 (C.A.D.C.); *Fischler* v. *McCarthy*, 117 F. Supp. 643, 648–650 (S.D.N.Y.) (dictum), affirmed on other grounds, 218 F. 2d 164 (C.A. 2); *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (three-judge district court, D.C.); *Pauling* v. *Eastland*, 288 F. 2d 126, 130 (C.A.D.C.), certiorari denied, 364 U.S. 900.

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